SUPREME COURT, U. S.

FILED

JUL 19 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 393

LEROY GARBER,

Appellant,

—v.—

THE STATE OF KANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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Bird, The Unyielding Amish, Saturday Evening Post, June 17, 1967, p. 28 18

Garino, Iowa Amish and Nonconformity in 3 Rs, The Wall Street Journal, June 14, 1967, p. 16 18

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THE STATE OF KANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Kansas, entered on November 5, 1966, which affirmed his conviction of violating the Kansas Compulsory School Attendance Law, by failing to require his minor daughter to attend school as specified in the statute. Appellant submits this statement to show that the Supreme Court has jurisdiction and that substantial questions are presented.

Opinion Below

The decision and opinion of the Supreme Court of the State of Kansas is reported at 197 Kan. 567, 419 P. 2d 896. The opinions of the District Court of Reno County, Kansas,

have not been reported. Copies of these opinions are set forth in the Appendix, *infra*, pp. 21, 35 & 47.

Jurisdiction

The State of Kansas commenced this action in the District Court of Reno County, Kansas, by filing a criminal information charging appellant, LeRoy Garber, with violating Chapter 409 of the 1965 Session Laws of the State of Kansas, K. S. A. 1965 Supp. 72-4801. The charge was that he did unlawfully and willfully fail to require his daughter, Sharon Garber, a minor under the age of 16 years, "to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor".

A jury was waived, and the case was tried to the court on a stipulated set of facts. Appellant defended on the grounds that he was not guilty of any offense and that the statute and its application were unconstitutional infringements of religious liberty. The District Court held the statute constitutional, found appellant guilty as charged, and imposed as its sentence a fine in the amount of $5.00. On November 5, 1966, the Supreme Court of the State of Kansas filed its opinion and decision which affirmed the conviction of Appellant and held the statute constitutional.

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Kansas on January 25, 1967. On March 27, 1967, Appellant's time to file this Jurisdictional Statement was extended for a period of 45 days, by order of the Supreme Court of the State of Kansas; on May 8, 1967, appellant was granted an

additional 60 days in which to file this Jurisdictional Statement; and on July 7, 1967, appellant's time to file this Jurisdictional Statement was further extended for a period of ten days.

Jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C. §1257(2). The following decisions are believed to sustain jurisdiction: *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Statute Involved

Chapter 409 of the 1965 Session Laws of the State of Kansas, K. S. A. 1965 Supp. 72-4801:

> "That every parent, guardian or other person in the state of Kansas, having control over or charge of any child who has reached the age of seven years and is under the age of sixteen years, shall require such child to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, in which all instruction shall be given in the English language only, each school year, for such period as the public school of the district in which the child resides is in session.
>
> "Any child who is physically or mentally incapacitated for the work of the common schools is exempt from the provisions of this act. . . . If such child is found capable of doing the work of the common or high schools, as the case may be, the child shall not be exempt from the provisions of this act, except as specifically provided herein. A child attending sec-

ondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents or the guardian of such child is filed with the proper authorities of the school attended, requesting that the child not be required to participate in such activity and stating the reason for such request."

Questions Presented

1. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Free Exercise of Religion Clause of the First Amendment to the Constitution of the United States.

2. Whether the decision of the Supreme Court of Kansas, in affirming the constitutionality of such statute on the grounds that the First Amendment protects only religious beliefs but not religious practices, is an erroneous interpretation of the First Amendment to the Constitution of the United States.

3. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Establishment of Religion Clause of the First Amendment to the Constitution of the United States.

4. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Establishment of Religion Clause of the First Amendment in that it permits certain types of religious denominational or parochial schools, but forbids the type of religious school selected by the appellant for attendance by his daughter.

5. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

Prior to July 1, 1965, the Kansas Compulsory School Attendance Law covered children between the ages of seven and sixteen years:

> "Provided, That this act shall not apply to any child who has completed the eighth grade" (G. S. 1949 72-4801).

Sharon Garber, appellant's daughter, completed the eighth grade at Elreka Public School in Reno County, Kansas, in May, 1964 (R. 19). She was then 14 years of age. In September, 1964, Sharon enrolled as a high school student under the Vocational Cultural Plan of a correspondence school, the American School, in Chicago, Illinois (R. 21).

When the Compulsory School Attendance Law was amended, effective July 1, 1965, deleting the eighth grade exemption, the Amish community in Yoder, Kansas, created the Amish Parochial School Vocational Educational Plan, in an attempt to comply with the law. Under this Plan instruction was divided between formal classroom work at the Harmony School in Yoder, and home study and vocational training closely supervised by written reports (R. 20). Sharon Garber was enrolled in both schools at the time the criminal complaint against her father was filed (R. 20, 21). He was accused of failing to comply with the Compulsory School Attendance Law of the State of Kansas (R. 4).

Appellant's refusal to require his daughter to attend a public high school was based on his belief that yielding to such requirement would violate his religion. He concedes the right of the state to insure that his daughter receives certain minimum education, namely, that she learn to read, write, and figure, and that she acquire a basic knowledge of our form of government, so that she be raised as a good citizen and be able to care for herself. Appellant, however, contends that he was providing her with such an education, and that to expose her to the worldly secularization and disturbing influences of the public high school would be directly contrary to his religious beliefs (R. 16, 18, 19).

The following salient facts appear variously in the agreed statement of facts upon which the case was tried, and in the various opinions of the court below:

(1) The District Court found:

> "... that the Amish in Kansas are a quiet, pious, law-abiding and industrious people whose vitalizing contributions to the development of the agricultural resources of the communities in which they live are substantial ...." App., *infra*, p. 45.

(2) Appellant's religious resistance to formal worldly education is based upon his literal reading and acceptance of the Bible as guidance, as prescribed by the Amish religion (R. 16).

(3) Appellant's religious beliefs include properly training and educating his daughter for womanhood. In accordance with the way of life and religious belief of the Amish, he was safeguarding her religious beliefs and faith by keeping her at home, under the influence of her parents, other Amish, and an Amish teacher. At the same time he

insulated her from the worldly distractions and influences which she would receive in public school at this most impressionable age. Excessive contact with modern education would in his view and the view of his church divert her from Amish religious and farm life (R. 12).

(4) Appellant is attempting to maintain his religious way of life through his children. If Sharon were to be sent to a large consolidated public school, she would be part of a minority, wearing peculiar dress, and with habits and customs which would make her subject to ridicule. She would be exposed daily to worldly ways, with their emphasis on entertainments, dances, bands, orchestras and sports, which are contrary to the Amish religious beliefs (R. 18, 19).

(5) Appellant was likewise attempting to comply with the intent and spirit of the law, by providing an education where his daughter was learning to read, to write and to figure. She was taking courses in civil government and United States History, in addition to her vocational training in homemaking, secretarial sciences, general agriculture, English and German (R. 21).

(6) The State maintained, that in order to comply with the law, education had to be received within "four walls," five days a week, six hours a day for 180 days; and that equivalent education, no matter where else it might be procured, was not acceptable.

Appellant contended before the District Court that if his daughter's schooling did not comply with the law, then the law, as applied to him, was invalid and unconstitutional, since the facts showed that his daughter was receiving more than the minimum education required by law (R. 62, 68, 69).

To force him to place her in another school (and a public school is all that would be available) violated his freedom of religion and his natural rights as a parent, without a showing of any danger to either his daughter or to society. Such a requirement would deprive him of the equal protection of the laws, since certain types of private, denominational or parochial schools are allowed, but the parochial schooling chosen by appellant for his daughter is disallowed.

The case was tried to the court without a jury on a stipulated set of facts. The District Court resorted to Article II, Chapter 72, of the Statutes of Kansas, captioned "Common School Courses and Related Provisions" (which, by its very caption, does not relate to parochial or private schools) to find that the Harmony School does not qualify, since it does not meet within four walls for six hours a day, five days a week.

The District Court, in its Memorandum Opinion dated January 10, 1966, found against appellant and imposed its judgment and sentence as indicated (App., *infra*, pp. 35-46).

A motion to amend the Findings, make Additional Findings, amend the Judgment accordingly, and for a new trial, on the ground that Chapter 409 of the 1965 Session Laws violated the Constitutions of the State of Kansas and of the United States (R. 3, 67), was duly filed, and decided by the District Court against the appellant, by Memorandum Opinion dated January 24, 1966 (App., *infra*, pp. 47-54).

The Notice of Appeal to the Supreme Court of Kansas stated, among other grounds, that Chapter 409 of the 1965 Session Laws of Kansas violated the appellant's rights under the First and Fourteenth Amendments to the

Constitution of the United States, specifically, that the Compulsory School Attendance Law, as applied to appellant, violated his constitutionally guaranteed religious freedoms.

The Supreme Court of the State of Kansas affirmed the decision of the District Court, holding that the statute did not violate the freedom of religion clauses of the First Amendment to the United States Constitution (App., *infra*, pp. 30-34). The Court failed to consider whether the statute violated the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, although these questions were specifically raised.

The Questions Are Substantial

The 1965 statute, and the ruling of the Supreme Court of Kansas upholding its constitutionality, can effectively destroy the entire system of Amish parochial school education in the State of Kansas. For appellant and his fellow-Amish, the education of their children in accordance with Amish religious principles is not just a matter of choice, or preference. It is an essential postulate of their religious faith. Consequently, the Kansas statute, which outlaws Amish parochial schools, is not only a violation of appellant's religious liberty, but it threatens the continued existence of a minority religious group.

This infringement of religious liberty is sought to be justified by the Supreme Court of Kansas on the ground that the First Amendment protects only "religious beliefs," not "religious practices." But neither the cases cited nor the reasoning of the court below support that proposi-

tion, neither generally nor especially as applied to the facts of this case. Indeed there are an increasing number of religious "practices" which this Court and other courts have held to be protected by the First Amendment. Appellant urges that the acts (or omissions) for which he stands criminally convicted are and should be well within the perimeter of constitutionally protected religious liberty.

Moreover, the statute as applied disallows the Amish type parochial school, although the very words of the statute do not make any distinction between public schools and "denominational or parochial" schools. Since one type of religious school is disfavored, the others are preferred. This raises questions of establishment of religion under the First Amendment and corresponding violations of due process of law and equal protection of the laws under the Fourteenth Amendment.

I

Mr. Justice Jackson has aptly described the role of the parochial school: "It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task." *Everson* v. *Board of Education*, 330 U. S. 1, 18, 23 (1947) (dissenting opinion). Since *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), it has been clear that a state may not prohibit parochial school education via a compulsory public school attendance statute. "The child is not the mere creature of the state; those who nurture and direct his destiny have the right, coupled with the high duty,

to recognize and prepare him for additional obligations." 268 U. S. at 535.

Appellant's choice of a religious school for his child may not be restricted because the school operated by his religious group differs from the popular conception of a parochial or denominational school. "The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views," *Follett* v. *McCormick,* 321 U. S. 573, 577 (1944); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953).

To tell appellant and his fellow-Amish that their religious school can qualify under the Kansas statute, on condition that they arrange for required classroom instruction for a specified number of hours, in no way answers the constitutional claim. Their religious belief *compels* a specific type of religious school, and *forbids* others. Moreover, appellant and his fellow-Amish have a reasonable fear that if they conduct a school which resembles other schools, the children may drift away from their parent's religion. Thus the acceptance of such a condition would require a compromise of religious belief. To compel its acceptance under threat of criminal sanction, is a violation of religious liberty. See *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). It is no less a violation of religious liberty to impose an unconstitutional condition, see *Speiser* v. *Randall,* 357 U. S. 513 (1950), on the operation of a religious school, than it is to ban it altogether, *Pierce* v. *Society of Sisters, supra.*

Consequently, it can hardly be doubted that the Kansas statute, on its face and as applied, threatens the religious liberty of appellant and many others similarly situated.

It imposes a criminal penalty on the observance of religious precepts, and places pressures on appellant to forego them. *Sherbert* v. *Verner, supra.* This Court should note jurisdiction to redress a direct assault on religious liberty in violation of the First Amendment.

II

The Supreme Court of Kansas has apparently acknowledged that the statute infringes on appellant's sincerely held religious beliefs, but it justified the infringement by attempting to draw a distinction "between religious beliefs and religious practices" (App., *infra*, p. 31). The court below seeks to support this distinction by the overbroad assertion that: "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has *never* been condoned in the name of religious freedom."[1] (*Ibid.*) (Emphasis added.)

With this statement the Supreme Court of Kansas has begged the central questions of the case. Surely there are constitutional limits even to "the exercise of the police power for the general welfare." Whether or not the statute is "reasonable" will certainly depend, at least in part, on whether and, if so, to what extent religious liberty is violated, and on an evaluation of the countervailing interests of the state. There must be some mechanism or test for judging the claim of religious liberty against the

[1] This formulation does not appear to have its origin in any of the cases cited in the opinion below. But see 3 ALR 2d 1401: "It may be stated as a general rule that a failure to comply with reasonable civil requirements beneficial to the health, welfare, or morals of the community will not be condoned in the name of religion."

expressed governmental interest. It is not enough simply to place a badge of "reasonable" on anything which is adopted by majority vote of the legislature.

Nor is the problem met by designing two receptacles, one labelled "beliefs" and the other "practices." Indeed, the court below erred by stating that while beliefs are constitutionally protected, practices have "never been condoned in the name of religious freedom." To the contrary, a wide variety of religious practices[8] have been expressly condoned.[9] These include: refusal of Jehovah's Witnesses to engage in public school flag salute ceremonies, *West Virginia State Board of Education* v. *Barnette, supra*; refusal of a Seventh Day Adventist to be available for Saturday work as a condition for receiving unemployment compensation, *Sherbert* v. *Verner, supra;* an atheist's declining to swear a belief in the existence of God, which was a state constitutional requirement for the holding of public office, *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); the refusal, because of religious scruples, to serve on a jury, *In re Jenison*, 265 Minn. 96, 120 N. W. 2d 515 (1963), vacated and remanded 375 U. S. 14 (1963), reversed 267 Minn. 136, 125 N. W. 2d 588

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[8] To be precise, appellant's criminal conduct was not a religious practice as much as it was a refusal on grounds of religious belief to perform a legally required act. Whether or not there is a constitutional difference between a religiously compelled act, cf. *Reynolds* v. *United States*, 98 U. S. 145 (1878), and a religiously compelled omission, cf. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), it is plain enough from the cases cited in the text that both categories have been condoned.

[9] Curiously, the opinion of the Supreme Court of Kansas neither cites nor attempts to distinguish any of the cases in the text which follows.

(1963);[4] the use, for religious worship purposes, of a hallucinogenic drug, *People* v. *Woody*, 61 Cal. 2d 716, 40 Cal. Rep. 69, 394 P. 2d 813 (1964), see *In re Grady*, 61 Cal. 2d 88, 39 Cal. Rep. 912, 394 P. 2d 728 (1964); and a wide assortment of religious preaching and proselytizing acts and practices, see *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *City of Opelika*, 319 U. S. 103 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953).

On the other hand, certain practices, notwithstanding their practitioners' religious bona fides, have been found to be subject to regulation or prohibition notwithstanding the guarantee of religious liberty. These include polygamy, as a practice deeply abhorred by society, *Reynolds* v. *United States*, 98 U. S. 145 (1875); the refusal of compulsory vaccination in the presence of a threatened

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[4] The *Jenison* litigation illustrates the role of this Court in the definition and expansion of religious liberty under the First Amendment. The Minnesota Supreme Court first ruled that the claim of religious liberty must be subordinated to the obligation to perform jury service. 265 Minn. 96, 120 N. W. 2d 515. In its brief remand order, this Court directed that the question be reconsidered in the light of *Sherbert* v. *Verner*, *supra*. 375 U. S. 14. On remand, the Supreme Court of Minnesota, instead of automatically ruling that the state interest must prevail, applied the balancing test and concluded that ". . . until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt." 125 N. W. 2d at 589. This rule has been followed in other states. *State* v. *Everly*, 150 W. Va. ——, 146 S. E. 2d 705 (1966), see *In re Williams*, 269 N. C. 62, 152 S. E. 2d 317 (1967), and was foreshadowed by Judge Schwellenbach in *United States* v. *Hillyard*, 52 F. Supp. 612 (E. D. Wash. 1943).

epidemic, *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); and the vending of religious literature by a nine year old as a violation of a state child labor law, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).*

Thus the most that can be said is that some religious practices are not protected by the First Amendment. The

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*The Supreme Court of Kansas cited as its principal authority, the decision of the Supreme Court of Pennsylvania in *Commonwealth* v. *Beiler*, 168 Pa. Super. 462, 79 A. 2d 134 (1951), which in turn cites *Reynolds* v. *United States*, *supra*, *Prince* v. *Massachusetts*, *supra*, and other cases. It is submitted, with respect, that both state Supreme Courts erred in a number of the citations: (1) *Stansbury* v. *Marks*, 2 Dallas 213, 1 L. Ed. 353 (1793) is a one paragraph report of a decision of a Pennsylvania court [not the Supreme Court of the United States] which imposed a fine of 10 pounds on a Jew who refused to be sworn as a witness on the Sabbath. It is completely discredited by *Sherbert* v. *Verner*, *supra*, and *In re Jenison*, *supra*. (2) *Specht* v. *Commonwealth*, 8 Pa. 312 (1848) is an old Pennsylvania Sunday law case punishing a Seventh Day Baptist which is obviously out of phase with *Sherbert* v. *Verner*, *supra*, and not legitimatized by the Twentieth Century economic and sociological changes in the nature of Sunday law observance reflected in *Two Guys from Harrison-Allentown* v. *McGinley*, 366 U. S. 582 (1961). (3) *Commonwealth* v. *Herr*, 39 Pa. Super. 454 (1909), aff'd 229 Pa. 132, 78 Atl. 68 (1910), which forbade the wearing of Mennonite religious garb by a public school teacher is essentially a problem under the establishment of religion clause of the First Amendment, not the religious liberty clause. See *Zellers* v. *Huff*, 55 N. M. 501, 236 P. 2d 949 (1951); see also Karpatkin, Public Assistance to Parochial Schools, *America*, April 7, 1966. (4) *Hamilton* v. *Regents*, 293 U. S. 245 (1934), which approved compulsory ROTC at a state university over a claim of conscientious objection to military training is distinguishable on two grounds: (i) appellant's daughter is subject to a compulsory school attendance law, while university attendance is volitional, and (ii) plaintiffs in the *Hamilton* case were free to seek college education at some institution whose curriculum requirements were compatible with their religious beliefs, but for appellant attendance at any school other than an Amish school would constitute an infringement of religious liberty. (5) *Commonwealth* v. *Lesher*, 17 S & R 155 (1828) another old case, is merely a general statement which offers no guidance for this case. (6) *Reynolds* v. *United States*, *supra*, and (7) *Prince* v. *Massachusetts*, *supra*, are discussed in the text.

problem, which was not even considered by the Supreme Court of Kansas, is to determine and apply the proper criteria.

Appellant urges that this case is not controlled by the polygamy cases, nor by the vaccination cases, nor by the child labor case. Attendance at the Amish type parochial school, while disapproved of by a majority of the Kansas legislature is not, like polygamy, an "odious" practice comparable to human sacrifice, *Reynolds* v. *United States, supra,* or "deeply abhorred by society," *Braunfeld* v. *Brown,* 366 U. S. 599, 619 (1961) (dissenting opinion by Mr. Justice Brennan).

Compulsory vaccination, particularly during an actual or threatened epidemic, *Jacobson* v. *Massachusetts, supra,* is a measure necessary for the health (and frequently life) not only of the individual whose vaccination offends religious beliefs, but for others as well. There are no such considerations in this case.

As for *Prince* v. *Massachusetts, supra,* a state may well have a greater interest in keeping a nine year old off the city streets than in keeping a 15 year old from attending a parochial school which has less than the required number of classroom hours. It is one thing not to interfere with a legislative judgment that a child of tender years will be harmed by the vending of newspapers on city streets, including religious papers. It is quite another to sanction a legislative conclusion that the goals sought to be achieved by compulsory education cannot be satisfied in any other manner than that of the Kansas statute.

Appellant urges that the proper test to be applied in this case, where bona fide questions of religious liberty are

raised, as in all cases of First Amendment freedoms, is the clear and present danger test. See *Cantwell* v. *Connecticut*, *supra*.[7] Surely it will not be contended that appellant's refusal to require his daughter to attend an approved school constitutes a clear and present danger to any valid state interest, "or other immediate threat to public safety, peace or order." *Id.* at 308.[8] The Supreme Court of Kansas, in its mechanistic holding that religious liberty must be subordinated, has ignored the decisions of this Court which have reiterated that religious liberty under the First Amendment occupies a preferred constitutional position. *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943), reversing *Jones* v. *Opelika*, 316 U. S. 584 (1942). Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938).

Appellant has no quarrel with the principle of compulsory education. But where a state's compulsory education law conflicts with appellant's religious beliefs in terms of the number of classroom hours at the parochial school appellant has chosen, appellant submits that religious liberty does not permit the state simply to outlaw appel-

[7] See also *Wood* v. *Georgia*, 370 U. S. 375 (1962); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Taylor* v. *Mississippi*, 319 U. S. 583 (1943); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Whitney* v. *California*, 274 U. S. 357 (1927); *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). See Emerson, *Toward a General Theory of the First Amendment*, 51-53 (Vintage Edition 1967).

[8] Even if the *ad hoc* balancing test were to be used, appellant submits that the interest in religious liberty outweighs any countervailing state interest. See *Sherbert* v. *Verner*, *supra*; *In re Jenison*, *supra*. See also Frantz, "The First Amendment in the Balance," 71 Yale L. J. 1424 (1962). However, the Supreme Court of Kansas used *no* test, and does not appear to have recognized that any test was appropriate.

lant's choice. At the very least the state must have a rational basis to conclude that appellant's daughter has not achieved or would not be likely to achieve the same educational attainments from her parochial schooling as could have been achieved in a public school or an orthodox parochial school. No such showing has been made here.[9]

The State of Kansas has made no attempt to accommodate the public interest in an educated citizenry with the concededly sincere claim of infringement of religious liberty.[10] This Court should note jurisdiction of this appeal not only to reverse the violation of religious liberty which is before it, but also to lay down the proper metes and bounds of a compulsory school attendance law which clashes with religious scruples.

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[9] There is no indication that Amish children, educated at an Amish parochial school, turn out any less educated or less capable of coping with the problems of adult life which they will face, than children educated in approved schools. See Bird, "The Unyielding Amish," Saturday Evening Post, June 17, 1967, pp. 28 et seq. See also Garino, "Iowa Amish and Nonconformity in 3 Rs," The Wall Street Journal, June 14, 1967, p. 16.

[10] Even a legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488. Compare *Wright* v. *State*, 21 Okla. Cr. 430, 209 Pac. 179 (1922), where the Supreme Court of Oklahoma reversed a conviction of a Seventh Day Adventist who claimed that his religious beliefs compelled him to educate his children at home, in violation of the Oklahoma compulsory school attendance law. The Court held: "So long as the child's education was not neglected, we think these parents, under the Constitution and laws of this state, had a right to manage and supervise the education of their child, if done in a fitting and proper manner." 209 Pac. at 180.

III

Any violation of religious liberty in this case is likewise an act which prefers "one religion over another," *Everson* v. *Board of Education*, 330 U. S. 1, 15-16 (1947), since all other parochial and denominational schools are presumably allowed to operate without interference. The granting of any benefit, or the imposition of any burden, flowing from differences in religious beliefs, constitutes an establishment of religion. *Torcaso* v. *Watkins*, 364 U. S. 488 (1961). Such a preference, and corresponding disfavor, is simultaneously a violation of the constitutional limits placed by the Fourteenth Amendment on state action. It is a denial of the equal protection of the laws, see *Fowler* v. *Rhode Island*, 345 U. S. 67, 70 (1953) (concurring opinion by Mr. Justice Frankfurter); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). It is also a deprivation of liberty without due process of law, see *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400 (1923).

CONCLUSION

This case presents substantial federal questions of the scope of religious liberty under the First Amendment. Consideration and resolution of these questions merit plenary argument before the court.

Respectfully submitted,

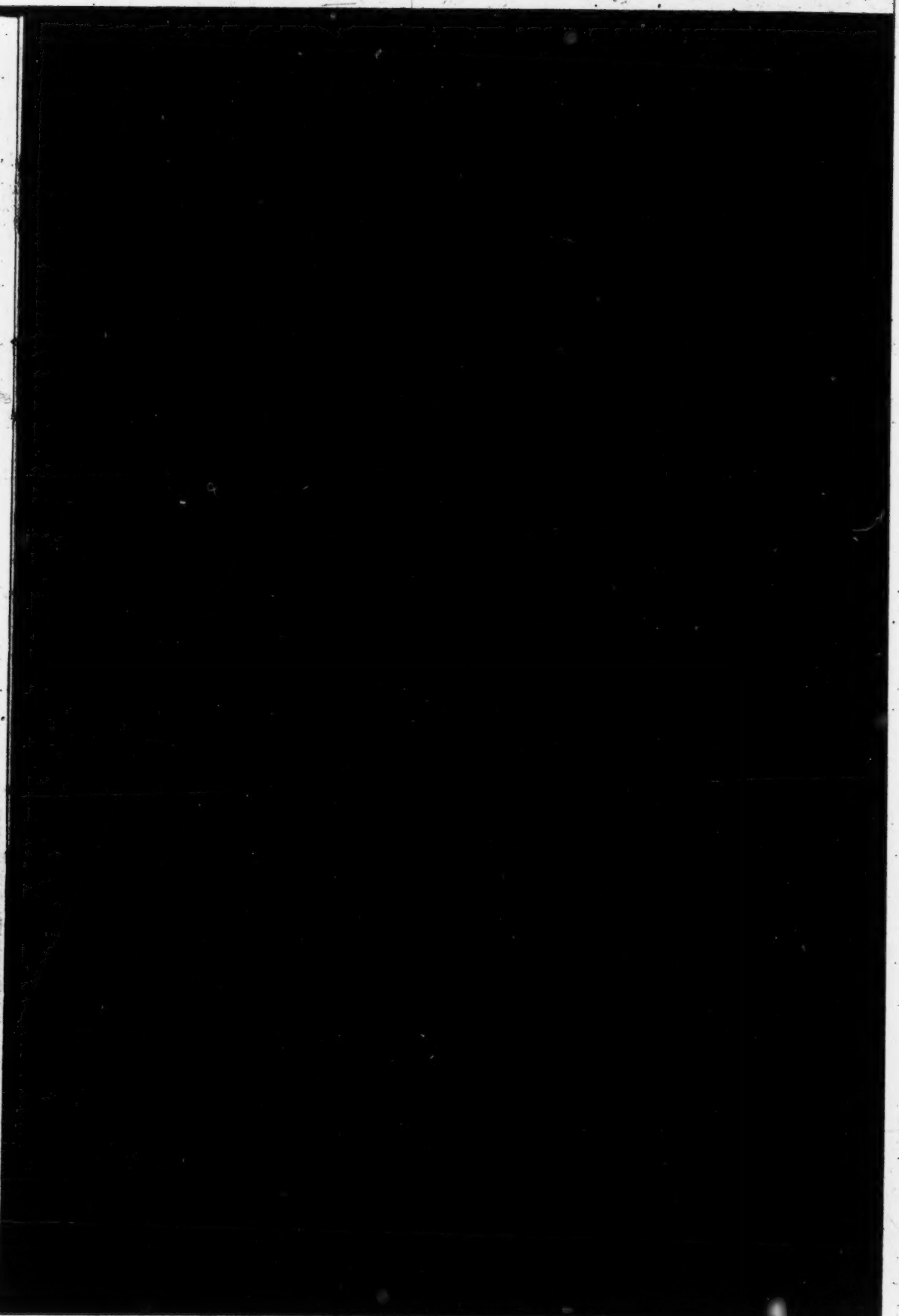
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July 1967



APPENDIX

Opinion of the Supreme Court of the State of Kansas

No. 44,583

THE STATE OF KANSAS,
Plaintiff-Appellee,

—v.—

LEROY GARBER,
Defendant-Appellant.

SYLLABUS BY THE COURT

1. A system of education which consists essentially of home instruction does not satisfy the requirements of our compulsory school attendance law (K.S.A. 1965 Supp. 72-4801).

2. The legislature has made no provision for the giving of instruction equivalent to that given in a public, private, denominational or parochial school as a basis for exemption from the provisions of the compulsory school attendance law. The only exemption now enumerated in that law is based on physical or mental disability of the child, and, in view of the legislative history of the statute, this is deemed exhaustive of such exemptions.

3. K. S. A. 72-1106 defining the school month is a statute of general application and is to be considered in connection

with the compulsory school attendance law in determining the requisite period of attendance.

4. The natural rights of a parent are subordinate to the police power of the state and may be restricted by municipal law providing minimum educational standards.

5. Our compulsory school attendance law (K. S. A. 1965 Supp. 72-4801) is a valid exercise of the police power.

6. Religious liberty includes the absolute right to believe but only a limited right to act.

7. The individual cannot be permitted upon religious grounds to be the judge of his duty to obey laws enacted in the public interest.

8. The record of trial in a criminal prosecution brought against defendant for violation of the compulsory school attendance law (K. S. A. 1965 Supp. 72-4801), examined and *held*, (1) the agreed statement of facts in the case support the finding of guilt made by the trial court, and (2) as applied to defendant and his daughter, members of the Old Order Amish Mennonite Church, such law does not infringe upon religious freedom guaranteed by the state and federal constitutions.

Appeal from Reno district court, division No. 2; JAMES H. REXROAD, judge. Opinion filed November 5, 1966. Affirmed.

E. Dexter Galloway, of Hutchinson, argued the cause and was on the brief for the appellant.

Richard J. Rome, county attorney, argued the cause, and *Raymond F. Berkley* and *Lane H. Cronhardt*, assistant county attorneys, were with him on the brief for the appellee.

The opinion of the court was delivered by

HARMAN, C.J.: This appeal involves the construction and constitutionality of our compulsory school attendance law as applied to the Amish people.

The action as commenced in the district court of Reno County, Kansas, by the filing of an information charging that defendant LeRoy Garber failed on or about October 18, 1965, to require his fifteen year old daughter, Sharon Garber, then under his control, to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, in violation of K. S. A. 1965 Supp. 72-4801.

A jury was waived and the action was tried to the court on a written agreed statement of facts. Defendant was found guilty as charged. Subsequently he filed motions to amend the findings and judgment and for a new trial which were all overruled, and defendant was sentenced to pay a fine of $5.00 and costs. His appeal to this court from that sentence presents two questions: First, whether under the facts he is guilty of any offense and, second, whether as applied to him our compulsory school attendance law violates his constitutionally guaranteed religious freedom.

The stipulation of the parties reveals the following pertinent facts: Defendant LeRoy Garber is a member of the Old Order Amish Mennonite Church. He is the father of Sharon Garber, who was born September 18, 1950, and who is under his control. Sharon completed the eighth grade in the public schools, finishing at Elreka, Reno County, Kansas, in May of 1964; since that time she has not been enrolled as a student at any public school in Reno County, Kansas. Her home school district is the Partridge

Rural High School District in Reno County which commenced its 1965-1966 school year on August 25, 1965, to run for 180 days. In September of 1964 Sharon enrolled as a high school student in a correspondence school in Chicago, Illinois, known as the American school, and at all times applicable herein she has continued to take certain correspondence courses contained in what is known as a vocational cultural plan and has made high grades. This school is approved by the United States Office of Education for private home study under certain laws whereby tuition may be paid by the federal government. On September 3, 1965, following the passage by the 1965 legislature of our present law requiring school attendance up to age sixteen, a group of Amish people in the Yoder community in Reno County, Kansas, established a school for their children known as the Harmony school. This school was organized pursuant to a written plan in accordance with the Amish religious faith and way of life. Its pupils are limited to those who have completed the eighth grade in public schools but have not attained the age of sixteen. It is taught by an Amish farmer whose formal education has consisted of eight grades in the public schools. Formal classes are held in the Harmony school one morning each week. On each of the remaining four school days students spend at home one hour in study and five hours in pursuit of vocational training upon which a written report is submitted to the instructor. All instruction is given in the English language except in a German reading course in which the German bible is used. Emphasis is placed on the vocational home training consisting generally of farming projects for boys and home economics and home management for girls. On October 5, 1965, defendant was served with a statutory notice of truancy (K. S. A. 72-4802) of his

daughter Sharon. Thereafter and on October 15, 1965, Sharon enrolled in the Harmony school and was so enrolled on October 18, 1965.

The agreed statement of facts also contains a history of the Amish people and a recital of their religious tenets and practices. Their religion stems from a seventeenth century branch of the Mennonite Church and they adhere strictly to the beliefs, customs and traditions embraced by their forefathers. Extremely conservative, they are a quiet, industrious, plain people who cherish three great values: A devout religion, an agrarian way of life, and a cohesive family and community. These values are deeply rooted in their educational views as in all aspects of their life. A cardinal tenet in the Amish faith is the Biblical injunction, "Be not conformed to this world", adherence to which, under their rigid interpretation, has doubtless contributed to their survival as a cultural group. Opposition to public secondary schools derives from their feeling that eventually this exposure of their children to that secular influence will erode the Amish way of life.

The first question posed is whether the facts support the finding of guilt of the defendant. Our compulsory school attendance statute is K. S. A. 1965 Supp. 72-4801 which provides in pertinent part:

> "That every parent, guardian or other person in the state of Kansas, having control over or charge of any child who has reached the age of seven years and is under the age of sixteen years, shall require such child to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, in which all instruction shall be given in the English language only, each school year, for

such period as the public school of the district in which the child resides is in session.

"Any child who is physically or mentally incapacitated for the work of the common schools is exempt from the provisions of this act. . . . If such child is found capable of doing the work of the common or high schools, as the case may be, the child shall not be exempt from the provisions of this act, except as specifically provided herein. A child attending secondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents or the guardian of such child is filed with the proper authorities of the school attended, requesting that the child not be required to participate in such activity and stating the reason for such request."

Noteworthy is the fact the act provides exemption only on the basis of physical or mental incapacity. K. S. A. 72-4802 complements the foregoing by prescribing an enforcement procedure, including service of truancy notice, and penalty for violation.

Defendant contends Sharon's enrollment in both the American school and the Harmony school satisfied the statute.

We have had compulsory school attendance laws in Kansas since 1874. Numerous amendments throughout the years reflect our transition from the frontier era. These changes have been in the number and nature of exemptions granted, the minimum and maximum ages of the children affected, and the length of time prescribed for school attendance. The last amendment and the one precipitating

this lawsuit was the elimination in 1965 of the proviso that the act should not apply to any child who has completed the eighth grade. One of the earlier changes is particularly significant for our purposes here. Prior to 1903 our truancy act provided, as an acceptable excuse for not requiring one's children to attend a public school,

> "... that such child or children are taught at home in such branches as are usually taught in the public schools, subject to the same examination as other pupils of the district or city in which the child resides...." (G. S. 1901, Par. 6420.)

The act was amended in 1903 by the elimination of the home study exemption. This court dealt with the effect of the amendment in *State* v. *Will*, 99 Kan. 167, 160 Pac. 1025, stating:

> "In the later act, which obviously was for the purpose of improving the truancy law and providing means for its enforcement through truancy officers, the significant language of the earlier act concerning the course of study imposed on home-taught pupils is left out. There must have been a reason for that. The act of 1903 (Laws 1903, ch. 423, Gen. Stat. 1909, Par. 7736 *et seq.*) enlarges as to the kind of schools which a child may attend to excuse him from public school attendance. They may be either 'private, denominational or parochial,' but nothing is said as to the course of study in such schools. These schools must be taught 'by a competent instructor, each school year, for such period as said school is in session.' May we not assume that the legislature knew what it was about when it provided in the earlier act that if the child were taught

> at home it must be in the common-school branches and that the child should be subject to examination as other district and city pupils might be. This provision would serve a useful and almost necessary purpose to prevent a mere pretense of home instruction to avoid the consequences of the truancy law. In the later act, it will be observed that home instruction is no longer an excuse for nonattendance in school, but the number and kind of schools to which he may be sent are enlarged. They may be either private, denominational or parochial." (p. 170.)

In *State* v. *Lowry*, 191 Kan. 701, 383 P. 2d 962, this court applied the reasoning expressed in *Will* and refused to approve what amounted to scheduled home instruction as an excuse for nonattendance in schools prescribed in the truancy act.

Thus we see neither the American nor the Harmony school, being essentially home instruction systems, constitutes a private, denominational or parochial school within the meaning of our truancy act. Even if, as contended by defendant, the instruction given through them could be considered as instruction equivalent to that given in a public, private, denominational or parochial school, this would not be an excuse for nonattendance at the latter for the reason that the legislature has made no provision for such equivalent instruction as the basis for exemption. The only exemption now enumerated in our truancy law as being acceptable for not sending a child to one of the named schools being for physical or mental disability of the child, this is, in view of the legislative history of the statute, deemed exhaustive of such exemptions.

It should be noted moreover that our law requires that the child "attend *continuously . . . for such period as the public school of the district in which the child resides is in session.*" (Our emphasis.) K. S. A. 72-1106 provides:

> "A school month shall consist of four (4) weeks of five (5) days each of six (6) hours per day on which pupils of a school are under direct supervision of its teacher or teachers while they are engaged together in educational activities. . . ."

From our examination of this statute we conclude it is one of general application and is to be considered in connection with the compulsory attendance law in determining the requisite period of attendance. Sharon did not attend any school wherein the school month consisted of four weeks of five days each of six hours per day during which pupils were under direct supervision of a teacher. Hence she did not continuously attend any school acceptable under our statute during the time the Partridge Rural High School was in session from August 25, 1965, through October 18, 1965. Therefore, her father, no matter how sincere or well intentioned, must be deemed guilty of violating the statute.

Defendant makes no general attack upon our compulsory school attendance law and indeed the validity of such laws has generally been recognized, for the natural rights of a parent to the custody and control of his child are subordinate to the police power of the state and may be restricted and regulated by municipal law providing minimum educational standards (79 C. J. S., Schools and School Districts, Par. 463 b.; 47 Am. Jur., Schools, Par. 156). The promotion of education is a legitimate function of the state,

and in Kansas is one particularly imposed on the legislature by article 6, section 2 of the constitution (see, *State, ex rel.*, v. *Kemp*, 124 Kan. 716, 261 Pac. 556). Defendant does challenge the application of the law to him by asserting it infringes upon his religious freedom guaranteed by our state and federal constitutions. The bill of rights of our state constitution, section 7, provides:

> "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. . . ."

The first amendment of the federal constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ,"

and the fourteenth amendment thereof provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

There is no contention here that the statute is unconstitutional because Sharon is compelled by law to go only to a secondary public school. That statute does not so require and would be invalid if it did although it is recognized the state can require that all children of proper age attend some school (*Pierce* v. *Society of Sister*, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468). Parents do have

the right to educate their children elsewhere than in the public schools, provided the state's minimum educational requirements are met (*Zorach* v. *Clauson*, 303 N. Y. 161, 100 N. E. 2d 463, affirmed in 343 U. S. 306, 96 L. ed. 954, 72 S. Ct. 679).

In accommodating between the competing right of the state to compel action in the public welfare and the right of the individual to his constitutional religious freedom the courts have distinguished between religious beliefs and religious practices. Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom. As stated in *Commonwealth* v. *Beiler, Appellant*, 168 Pa. Super. 462, 79 A. 2d 134, 137,

> "Religious liberty includes the absolute right to believe but only a limited right to act." (p. 468.)

These general principles have been invoked many times. Examples of distinctions made between belief and practice are concisely set forth in Beiler, supra, as follows:

> "A Mormon believed that plural marriage were divinely ordained but when he acted upon his belief he was convicted of polygamy. *Reynolds* v. *U. S.*, 98 U. S. 145, 25 L. Ed. 244. A Jew held his Sabbath a holy day but when he refused to be judicially sworn on Saturday he was fined. *Stansbury* v. *Marks*, 2 Dallas 213. A Seventh Day Baptist believed he should rest from his labors on Saturday and follow the divine command, 'six days shalt thou labor', but when he worked on Sunday he was convicted under the Act of 1794, *Specht* v. *Com.*, 8 Pa. 312. A Mennonite maid believed she should wear the distinctive garb of her

Church at all times, but she was not allowed to wear it in the school where she taught. *Com.* v. *Herr,* 39 Pa. Superior Ct. 454, affirmed 229 Pa. 132, 78 A. 68. Methodist students, who believed that 'participation in war is a denial of their supreme allegiance to Jesus Christ', were nevertheless required to receive military training at a state university. *Hamilton* v. *Regents,* 293 U. S. 245, 55 S. Ct. 197. A Jehovah Witness sent her minor child 'to preach the gospel' by selling religious pamphlets on the public highways and was convicted of a violation of a child labor law. *Prince* v. *Massachusetts,* 321 U. S. 158, 64 S. Ct. 438. An imposing list of similar cases might be easily compiled. In total they apply the principle which Gibson forcibly expressed in his memorable dissent in *Com.* v. *Lesher,* 17 S. & R. 155, 160: 'It is declared in the constitution [of 1790] . . . that "no human authority can, in any case, control or interfere with the *rights of* conscience." But what are those rights? Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which, *is not prejudicial to the public weal.* But *salus populi suprema lex,* is a maximum of universal application; and where liberty of conscience would impinge on the paramount right of the public, it ought to be restrained.' (Gibson's italics.)" (pp. 468, 469.)

In *Prince* v. *Massachusetts,* 321 U. S. 158, 88 L. ed. 645, 64 S. Ct. 438, mentioned in *Beiler* above, the parent as a member of Jehovah's Witnesses claimed the right "to

bring up the child in the way he should go [and] to teach him the tenets and practices of our faith." (p. 164.) In commenting on the parental claim the court said:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333. And neither rights of religion nor right of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways [citing cases]." (p. 166.)

Applying the foregoing, we are unable to perceive from the record before us how religious freedom is abridged in this case. There is no infringement upon the right to worship or to believe insofar as either defendant or his daughter is concerned. Their freedoms to worship and to believe remain absolute and are not affected by our compulsory school attendance law. Defendant may instruct his daughter in religious beliefs as he desires. It can scarcely be doubted that defendant is sincere when he says his religious convictions are violated if his daughter receives a secular type of education found in the secondary public schools, but it is apparent he does not object to secular education *per se* since his daughter has attended the elementary public schools eight years. We are not called upon to attempt to prescribe any permissible degree of secularity in education beyond which religious freedom is infringed. The question of how long a child should attend school is not a religious one. No matter how sincere he may be the individual cannot be permitted upon religious grounds to be

the judge of his duty to obey laws enacted in the public interest (*Rice* v. *Commonwealth*, 188 Va. 224; 49 S. E. 2d 342, 3 A.L.R. 2d 1392). We think the particular law at issue here is valid as applied to defendant and his daughter and does not infringe upon constitutionally guaranteed religious freedom.

For other decisions in harmony with the position taken herein on this question, see the following: *Com. ex rel. Sch. Dist. of PGH.* v. *Bey et ux.*, 166 Pa. Super. 136, 70 A. 2d 693; *Commonwealth* v. *Smoker, Appellant*, 177 Pa. Super. 435, 110 A. 2d 740; *State ex rel. Shoreline etc.* v. *Sup. Ct.*, 55 Wash 2d 177, 346 P. 2d 999, cert. den., 363 U. S. 814, 4 L. ed. 2d 1154, 80 S. Ct. 1248; *Shapiro* v. *Dorin*, 199 Misc. 643, 99 N. Y. S. 2d 830, affirmed without opinion, 278 App. Div. 705, 103 N. Y. S. 2d 757, affirmed without opinion, 302 N. Y. 857, 858, 100 N. E. 2d 48; *In Re Currence*, 42 Misc. 2d 418, 248 N. Y. S. 2d 251; *Cude* v. *State*, 237 Ark. 927, 377 S. W. 2d 816; *Mosier* v. *Barren County Board of Health*, 308 Ky. 829, 215 S. W. 2d 967; *Commonwealth* v. *Renfrew*, 332 Mass. 492, 126 N. E. 2d 109; *State* v. *Hershberger*, 103 Ohio App. 188, 144 N. E. 2d 693.

The judgment is affirmed.

APPROVED BY THE COURT.

Opinion of the District Court of Reno County, Kansas

Filed, January 10, 1966

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

Case CR 7679

MEMORANDUM OPINION

This matter comes before the court for decision upon stipulated facts, a jury trial being expressly waived by the Defendant in writing.

Citations:

Section 7, Bill of Particulars, Kansas Constitution states: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief".

Chapter 409, 1965 Session Laws of Kansas, in substance, requires every parent, having control of any child who has reached the age of seven years and is under the age of sixteen years, to have such child attend continuously a public school or a private, denomination or parochial

school taught by a competent instructor in the English language for such period as the public school of the district in which the child resides is in session. Any child attending secondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents of such child is filed with the proper school authorities requesting that the child not be required to participate in such activity and stating the reason for such request.

K.S.A. 72-4802 provides, in substance, that any parent of such child between seven and sixteen years delinquent in school attendance may be adjudged guilty of a misdemeanor and fined in a sum not less than $5 nor more than $25, and be committed to the county jail until same is paid.

K.S.A. 72-1103, in substance, provides that all schools, public, private or parochial, shall provide and give a complete course of instruction to all pupils, in civil government, and U.S. history, and in patriotism and the duties of a citizen, suitable to the elementary grades; in addition thereto, all high schools, public, private or parochial, shall give a course of instruction concerning the government and institutions of the United States, and particularly of the U. S. Constitution; and no student shall be graduated from such school who has not taken and satisfactorily passed such course.

K.S.A. 72-1106 provides, in substance, that a school month shall consist of four weeks of five days each of six hours per day on which pupils of a school are under direct supervision of its teacher or teachers while they are engaged together in educational activities.

Where the property rights of members of a church are not involved, our courts will not investigate or determine its faith or doctrine. The courts accept as true definitions of faith, the expressions and interpretations of ecclesiastical officers, governing church councils and judicatories which the church has authorized to speak for it. (3 Pa 282; 20 L.Ed 666; 41 Pa 9; 29 LRA 476).

In State v Lowry, 191 Kan 701, our Kansas Supreme Court, pointed out that Home Instruction was proper in Kansas at one time but subsequently the legislature deleted the home instruction proviso as a reason for not attending school. The present truancy act still omits the home instruction proviso. Following the decision in State v Will, 99 Kan 167, the legislature provided for the minimum course requirements of study to be taught in all schools (Laws 1919, Ch. 257, #2, the pertinent part of which is now K.S.A. 72-1103). In 191 Kan 701 the Court also held that in order to be classed as a private school, any school in Kansas must at least meet the course of instruction requirements of 72-1103, and the students must be taught by a competent instructor in the English language for the prescribed time as provided by K.S.A. 72-4801.

In Commonwealth v Beiler, (Pa) 79 A 2d 134, the defendants, members of the Amish sect, were convicted in lower court of violating the compulsory school attendance laws. Their children, age 14 years, had completed the 8th grade in public schools and were eligible for instruction in a highschool. The defendants refused to send said children to a secondary school, private, denominational or public, contending that such would be contrary to their religious beliefs. On appeal, the supreme court held: (a) parents have no constitutional right to deprive their chil-

dren of an education or prevent the state from assuring children adequate preparation for independent, intelligent exercise of their privileges and obligations as citizens of a free democracy, (b) that the state does not interfere with religious liberty by reasonably restricting parental control of minor children or compelling parents to perform their natural and civic obligations to educate their children within age limits and in subjects prescribed by law, whether in public, private or denominational schools or by approved tutors, (c) that the rights of conscience which the constitution declares that no human authority can control or interfere with, are simply rights to worship a Supreme Being according to dictates of the heart, adopt any creed or hold any opinion on the subject of religion, and do or forbear from doing, for conscience's sake, any act the doing or forbearing of which is not prejudicial to public weal, but liberty of conscience should be restrained where it would impinge on paramount rights of the public, and (d) that the State, as parens patriae, may restrict parents' control of their minor children by requiring school attendance thereby, though parents base their claim to control the children's course of conduct on religion or conscience. (see also Minersville School District v Gobitis, 60 S Ct 1010).

In People v Dorin, 99 NYS 2d 830, a Jewish sect's belief that systematic secular education was prohibited by Jewish law, resulting in members sending children to religious school which was not recognized by Jewish Education Committee for parochial schools, and which failed to meet state standards, was held no defense to a charge of violation of the New York compulsory education laws.

In Shoreline School District v Superior Court (Wash), 346 P2d 999, withdrawal of a 4th grade child from school

was not warranted by religious belief of parents forbidding presence where meat, fish, or fowl was served, or music played, and giving of instructions to child by its mother, who was a high school graduate, was insufficient to comply with education law.

In People v Turner, 263 P2d 685, it was held that a parent or private tutor instructing at home was not comprehended by statute exempting children from attending public schools if they attended private fulltime day school.

And in Re Shinn, 16 Cal Rptr 165, it was held children were not attending private school so as to be exempt from attending public school where the children were enrolled in a correspondence school, the parents who acted as tutors did not have valid state credentials for grades taught, and the children did not receive instruction in civics or California history.

In Ohio where statutes require children between certain ages to attend recognized public, private or parochial schools (with limited exceptions), if such children are sent to private schools, said private schools must provide instruction equivalent to free instruction furnished in public schools, and parents of children attending a private school in which the instruction given is not equivalent to instruction given in public schools to children of like ages and advancement, are guilty of violation of the state compulsory education law (State v Hershberger, 144 NE 2d 693).

In Re the Matter of Ronald Currence, 248 NYS 2d 251, the mother of a child of compulsory school age kept her child from public school on Wednesday afternoons through Thursday mornings for the purpose of religious observance and training. The mother and child were members of a religious sect known as the Ancient Divine Order of Melchiasadech, and it is one of their religious beliefs

that the Sabbath begins at noon on Wednesday of each week and ends at noon the following day. In this case the court held (a) while the state may not interfere with the religious beliefs of a person, it may, however, prohibit such acts or practices as are detrimental to the general welfare of the community, (b) that the freedom to believe as one chooses in the matter of religion is absolute, but the freedom to act in the exercise of religion is subject to regulation in the public interest and for the good order of society, and (c) that it was not a defense that a child may be withdrawn from school for observation of his Sabbath and religious instruction.

In 49 SE 2d 342 it was held the fact that parents' refusal to send their child to school was without intent to commit a crime did not preclude the enforcement of the penalty prescribed by the compulsory education law.

In Commonwealth v Bey (Pa), 70 A2d 693, the defendants were Mohammedans who refused to send their children of compulsory school age to school on Fridays, the sacred day of that religion, but did so on other school days. In this case the court held: (a) parents have no constitutional rights to deprive their children of blessings of education or prevent the state from assuring children adequate preparation for independent and intelligent exercise of their privileges and obligations as citizens of a free democracy, (b) the Pennsylvania statute requiring every parent of any child of compulsory school age to send such child to a day school and requiring that such child attend that school continuously through the entire term and providing that the requirement of compulsory attendance can be satisfied in day school, public school, private school or institution for the education of children does not interfere with or impinge on religious freedom

of parents or guarantees of either federal or state constitutions, and (c) where parents exercised option provided by statute and elected to send their children to public schools, they were bound to perform all requirements of compulsory attendance provisions and could not send their children to public schools on condition they would be excused on Fridays because of religious beliefs, and such parents had no constitutional right to submit only to a part of a statute. (see also Prince v Massachusetts, 64 S Ct 438; Commonwealth v Smoker, 110 A 2d 740).

In State v Vaughn, 207 A2d 537 (NJ) it was held the State's complaint need only to allege that the defendant as parent of the child did not cause said child regularly to attend the public school of the district in violation of the particular state law. It was then held incumbent upon the defendant, if he should rely upon exceptions, to introduce evidence to show attendance at day school in which there is given instruction equivalent to that provided in public schools, etc. unless of course, such appears from the state's case. Ultimate burden of persuasion remains with the State.

Findings of Fact:

The facts are as stipulated between the parties, said written stipulations and supplemental stipulations being made a part of this memorandum opinion by reference.

Conclusions of Law:

A. That the defendant has not complied with Kansas Compulsory school attendance laws. To illustrate:

1. Chapter 409, 1965 Session Laws of Kansas, requires a child of compulsory school attendance age, not attend-

ing public school, to attend *continuously* a private or parochial school *for such period as the public school of the district in which the child resides is in session.* And to comply with K.S.A. 72-1106 such child must attend a private or parochial school having a school month consisting of four weeks of five days each of six hours per day during which pupils are under *direct* supervision of its teacher while they are engaged *together* in educational activities.

a. Sharon Garber attends formal classes at Harmony School, under direct supervision of its teacher Amos Bontrager, during just one morning each week. During each of the 4 remaining days in the week Sharon, at home and on the job, spends one hour at study on courses taught at the Harmony School and five more hours each day in pursuit of vocational education and correspondence courses with a regular written report of such activities submitted to the regular teacher weekly. Sharon does not attend continuously a private school for such period as Partridge Rural High School is in session, nor during the statutory school month is she engaged together with other pupils in educational activities under the direct supervision of the Harmony school teacher.

2. Harmony school does not qualify with Kansas statutes so as to be a private or parochial school within the meaning of our compulsory school attendance laws. Again, to illustrate:

a. Pupils are engaged together in educational activities under the direct supervision of the teacher at Harmony school only one morning each week. This does not comply

with K. S. A. 72-1106, and Chapter 409, 1965 Sessions Laws of Kansas.

b. During actual sessions of Harmony school complete courses of instruction in the particulars set forth in K.S.A. 72-1103 are not given. Neither does this court feel Amos Bontrager is a competent teacher to teach same (see Kansas State Department of Public Instruction Subject & Field Requirements for Secondary Teachers, April 1961).

3. Correspondence and vocational courses given Sharon at her home and on the job, in effect, constitute "Home Instruction". Home instruction was once permitted in Kansas (see G. S. Kansas 1901, #5420) but later abolished (see G.S. Kansas 1906, #7736), and our current compulsory school attendance laws still omit the "home instruction" proviso. In this respect, K. S. A. 72-1106 and Chapter 409, 1965 Session Laws of Kansas are not complied with (see 191 Kan 701).

B. The defendant's religious beliefs are not a defense to failure to comply with the Kansas compulsory school attendance laws.

1. Parents have no constitutional right to deprive their children of an education or prevent the state from assuring children adequate preparation for independent, intelligent exercise of their privileges and obligations as citizens of a free democracy. The safety, integrity, independence, progress, and even the life, of our state and nation depend upon the enlightened intelligence of its citizens. And unless democracy lives, religious liberty cannot survive.

2. The freedom to believe as one chooses in the matter of religion is absolute, but the freedom to act in the exercise of religion is subject to reasonable regulation in the public interest and for the good order of society. The rights of conscience which the constitution declares that no human authority can control or interfere with are simply rights to worship a Supreme Being according to the dictates of one's heart, adopt any creed or hold any opinion on the subject of religion, and do or forbear from doing, for conscience's sake, any act the doing or forbearing of which is not prejudicial to the public weal, but liberty of conscience should be restrained where it would impinge on the paramount rights of the public.

3. The state does not interfere with religious liberty by reasonably restricting parental control of minor children or compelling parents to perform their natural and civic obligations to educate their children within the age limits and in subjects prescribed by Kansas Law, whether in public, private or denominational school. The State, as parens patriae, may restrict a parent's control over his minor child by requiring school attendance although the parent bases his claim to control the child's course of conduct on religion or conscience. Query: If the law could compel no parent to give his child more than an 8th grade education, then how long would it be before our better educated enemies would destroy this nation, including its Amish members?

Decision of the Court:

This court finds the defendant, LeRoy Garber, guilty as charged by the State in its information filed herein.

The defendant will inform the court forthwith if he desires to file a motion for a new trial; and if not, will appear for sentence before this court on Friday, January 14, 1966 at 9:00 o'clock A.M. for imposition of sentence.

Comments:

In making its decision the court recognizes that the Amish in Kansas are a quiet, pious, law-abiding and industrious people whose vitalizing contributions to the development of the agricultural resources of the communities in which they live are substantial. However, our legislature has seen fit recently to increase the compulsory school attendance age to 16 years for all children, and this court has a solemn obligation to uphold its provisions.

However, and solely as an informal suggestion, couldn't the Amish without much trouble either (a) qualify Harmony school as a parochial secondary school under Kansas law and thereby keep their children together and away from public school influences, or (b) get the legislature to re-insert the former "Home Instruction" proviso in the present compulsory school attendance statutes?

The defendant was charged with violation of the Kansas compulsory attendance law "on *or about* October 18, 1965" but Sharon did not enroll in Harmony school until October 15, 1965 (see Exhibit D). According to paragraph 61(a) of the stipulated facts Partridge Rural High School commenced its current school year on August 25, 1965. Plainly there was a violation of the compulsory school attendance laws between August 25, 1965 and October 15, 1965.

To this court's knowledge the constitutionality of the provisions of the Kansas compulsory school attendance law

was not raised as an issue by the parties, and thus same is not herein determined by the court.

An appropriate journal entry will be appreciated.

Dated January 10, 1966.

JAMES H. REXROAD
District Judge, Division II

Opinion of the District Court of Reno County, Kansas

Filed, January 24, 1966

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

Case No. CR 7679

146-175

MEMORANDUM OPINION

This matter comes before the court upon the motion of the defendant, LeRoy Garber, for a new trial. Arguments are presented by counsel.

The motion for a new trial, information, stipulated facts, exhibits and the court's memorandum opinion (decision), dated January 10, 1966, are included herein by reference.

The defendant's objections are discussed as follows, and in the order listed in his motion for a new trial.

1. The defendant states that the information filed herein charges the defendant with "wilfully" failing to require Sharon to attend school, and that wilfulness was not shown.

a. The term "wilfully" means done purposely and intentionally, and not by accident or surprise. In view of the expressed Amish opposition to schooling beyond the 8th grade and the defendant's membership in that church group, as mentioned in the stipulated facts, this court cannot agree that the defendant's failure to comply with our compulsory school attendance law was not done purposely and intentionally, especially between August 25 and October 15, 1965, when Sharon did not attend any school at all.

b. KSA 62-1011 provides, in part, that no information may be quashed or set aside (a) for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged, and (b) for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Not only was no attack made upon the language used in the information until after this court's January 10th decision, but it is felt (1) since Chapter 409 does not specify that failure to have a child attend school must be a "wilful" failure that the use of the word "wilful" in the information filed in this case is mere surplusage, and (2) same does not prejudice the substantial rights of the defendant. Surplusage is not a ground for quashing an information where the crime and the person are properly charged (172 Kan 737).

c. Not only may a parent violate a compulsory school attendance law by *wilfully* refusing to do so, but if he *neglects* to perform such a civil obligation he may be coerced by the law to execute it (see 47 Am Jr., Schools, #156; 61 NE 730).

d. The fact that a parent's refusal to send his child to school was without an intent to commit a crime does not preclude enforcement of the penalty prescribed by the compulsory school attendance laws (Rice v. Commonwealth, 49 SE 2d 342).

2. If, as the defendant contends in his motion for a new trial, the Amish attempted in good faith to have Harmony School comply with Chapter 409 then certainly they must have read the provisions of said Chapter 409, especially that portion requiring a child attending a denominational school to attend continuously for such period as the public

school in that district was in session; and accordingly, Harmony school sessions would have been more than one morning per week (and shouldn't the Amish also have read KSA 72-1103 and 72-1106†). The fact still remains (a) that Harmony school per se does not comply with Kansas school law requirements, and (b) that between August 25 and October 15, when Partridge Rural High School was in session, Sharon did not attend school at all in violation of Chapter 409.

4. Not only do Kansas compulsory school attendance laws not permit the giving of equivalent instruction elsewhere than in a school (see 99 Kan 167; 14 ALR 2d 1369), such laws now require a child to attend school until 16 years of age regardless of whether or not her level of achievement equals or exceeds the average of a common school student; in fact, Chapter 409 expressly states, "If such child is found capable of doing the work of the common or high schools, as the case may be, the child shall not be exempt from the provisions of the act * * * ". Since Sharon completed the 8th grade, and does not qualify for any of the listed exemptions, she must continue in a secondary school, public, private or parochial, until the age of 16 years is reached.

5. Article 11, by its heading, is not limited solely to "common school" courses but pertains also to other "related provisions". (See also 113 ALR page 702, and 51 Kan 792 to the effect that the term "common school" includes "high school").

a. 72-1103, thereunder, specifically refers to "all schools, public, private or parochial", and in addition, refers in part to "all high schools, public, private or parochial".

b. KSA 72-1106 is in effect applicable to a denominational school; i.e. Chapter 409 requires a child to attend continuously a private or denominational school for such period as the public school of the district in which the child resides is in session; and such public school must comply with KSA 72-1106 and conduct school sessions for the prescribed period of time.

6. KSA 60-409 permits a court to take judicial notice, without request by a party, of the duly published regulations of governmental sub-divisions or agencies of this state (the court also reached outside the record in obtaining the legal citations set forth in its January 10th decision inasmuch as neither the state nor the defendant offered any in behalf of their respective contentions).

7. In State v. Gill, 63 Kan 382, the information charged that the offenses were committed in June whereas the evidence showed same to have occurred in May. The court held that "the stat. is not required to prove that an offense was committed on the particular day named in the information but may show that it was committed at any time within two years next preceding the filing of the information" (see also KSA 62-1006; 33 Kan 708; 110 Kan 131; 85 F2d 996). Thus the court may consider Sharon's absence from any school between August 25 and October 15, 1965 in determining the defendant's innocence or guilt of the offense charged, and is not limited to the exact date set forth in the information filed herein . . . and accordingly, the defendant can be found guilty as charged, even though Harmony school were a qualified private or parochial school, which it is not.

8. As stated in the memorandum opinion, dated January 10, 1966, the constitutionality of the provisions (language) of the Kansas compulsory school attendance law was not raised as an issue by the parties, and thus was not determined by the court.

However, the following is now submitted :

a. "Statutes making the education of children compulsory have become very general in the United States. Their constitutionality is beyond dispute, for the natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and controlled by municipal law. One of the most important natural duties of a parent is the obligation to educate his child; this duty he owes not only to the child, but also to the commonwealth. Hence, if a parent neglects to perform such a civil obligation, or wilfully refuses to do so, he may be coerced by the law into executing it". (47 Am Jur Schools, #156).

b. Compulsory school attendance statutes have generally been regarded as valid where children may attend private or denominational schools instead of only public schools (79 CJS page 390).

c. With reference to the proviso about instruction given in the English language see 191 Kan 701, to wit; "Under the statutes applicable to the instant case, we are of the opinion that *any* school in order to be classed as a private school must at least meet the course of instruction requirements of 72-1103, and the children must be taught by a competent instructor *in the English language* for the prescribed period of time as required by 72-4801" (Chapter 409).

d. Paragraphs 2 & 3, Supplemental Stipulation, in substance, state classes and subjects at Harmony school are taught in the English language, except the German Bible (and which course is not a statutorily required one). The constitutionality of a part of a statute may be questioned only by one affected by the operation (179 Kan 638; 187 Kan 566). And ignoring the clause "all instruction shall be given in the English language only", Harmony school still does not qualify as a private or a denominational school under Kansas laws.

e. Chapter 409, in part, requires continuous attendance at school "in which all instruction shall be given in the English language only". Defendant now contends this particular clause or phrase conflicts with Meyer v. Nebraska, 67 L Ed 1042, but in said case the court carefully states, "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, *including a requirement that they shall give instruction in English*, is *not* questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy". However, for the purposes of argument let us assume that such phrase is unconstitutional and invalid. It is still a fundamental principle that a statute may be constitutional in one part and unconstitutional in another, and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. Indeed, it has been said that whenever a statute contains objectionable provisions separable from those found to be unconstitutional, it is the duty of the court to so declare and to maintain the act insofar as it is valid (16 Am Jur. 2d, Con-

stitutional Law, #181). Thus, it is held that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose it does not necessarily follow that the whole act is void, and effect may be given to the remaining portions (16 Am Jur. 2d, Constitutional Law, #182; 186; 140 Kan 744). It is also the duty of courts even though the legislature may not have expressed its will to that effect, to sever the valid from the invalid provisions of a statute and preserve the former if they relate to a distinct purpose which is not dependent upon the invalid provisions (16 Am Jur., 2d, Constitutional Law, #188; 183 Kan 287). It is this court's opinion that even if we eliminate the phrase "in which all instruction shall be given in the English language only" the rest of our compulsory school attendance laws are operative and sufficient to accomplish the general purpose of our legislature; and accordingly, are constitutional and valid (see also Commonwealth v. Snyder, 15 Pa Dist 765).

f. Pierce v. Society of Sisters, 45 S Ct Reptr 571, pertains to a state law requiring children to attend public schools exclusively. Our Kansas compulsory education laws give parents an option of sending their children to private or denominational schools. State v. Peterman, Commonwealth v. Beiler, Wright v. State and People v. Levison are cited by the defendant as supporting his contention he is not guilty as Sharon is receiving at home, instruction equivalent to that she would receive in school. Commonwealth v. Beiler and Wright v. State involve statutes wherein equivalent instruction elsewhere than at school may be given. In 14 ALR 2d 1369, Kansas (99 Kan 167) is listed among those states rejecting the contention that instruction in the home is instruction in a private school.

After consideration of the matters raised at the hearing of the defendant's motion for a new trial, this court finds that said motion should be, and same is, herewith overruled and denied.

In compliance with KSA 62-1723, the defendant will appear before this court on Wednesday, January 26, 1966, at 4:00 p.m., for imposition of sentence. (See KSA 72-4802 for sentence terms).

Dated January 24, 1966.

/s/ James H. Rexroad
James H. Rexroad
Judge Division II
40th Judicial District of Kansas

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 393

LeROY GARBER,
Appellant,

vs.

THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 393

LEROY GARBER,
Appellant,

vs.

THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in the above-entitled case be dismissed on the ground that it does not present a substantial federal question.

OPINION BELOW

The opinion of the Supreme Court of Kansas, affirming appellant's conviction of violation of the Kansas Compulsory School Attendance Law and upholding the constitutionality of that law, is reported at 197 Kan. 567, 419 P.2d 896, and appears in the appendix to the Jurisdictional Statement filed herein, at page 21. The opinions of the District Court of Reno County, Kansas, finding appellant guilty of such violation and denying his motion for new trial, are unreported, but likewise appear in appellant's Jurisdictional Statement at pages 35 and 47, respectively.

JURISDICTION

Appellant seeks to have this Court accept jurisdiction under 28 U.S.C. §1257(2).

STATUTE INVOLVED

Chapter 409 of the 1965 Session Laws of Kansas, K.S.A. 72-4801 (1965 Supp.), is set out in appellant's Jurisdictional Statement at pages 3-4.

QUESTIONS PRESENTED

1. Whether the foregoing statute, as interpreted and applied to this appellant, violates either the free exercise or establishment of religion clauses of the first amendment to the Constitution of the United States.

2. Whether the foregoing statute, as interpreted and applied to this appellant, violates either the due process or equal protection clauses of the fourteenth amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The Kansas Compulsory School Attendance Law, a type of law common to nearly all the states, was first enacted in 1874, and has continued on the books, with intermittent amendment, down to the present. Prior to 1965, the statute applied to children between the ages of seven and sixteen with the proviso that it was not applicable to any child who had completed the eighth grade. Effective July 1, 1965, the Kansas Legislature amended the law by eliminating the proviso so that, after that date, the statute required all children, with certain limited exceptions not here material, to attend either "a public school, or a private, denominational or parochial school." It was this amendment which precipitated the present controversy.

LeRoy Garber, appellant herein, is a member of the Old Order Amish Mennonite Church. It had been the practice of members of that church, prior to 1965, to terminate the formal education of their children upon completion of the eighth grade. The reaction of the Amish to the 1965 amendment was the establishment of Harmony School at Yoder, Kansas, to serve as the local Amish parochial school. Harmony School is taught by a single teacher having an eighth grade education and meets in formal classroom session one morning per week. An additional hour per each of the five school days is devoted to home study and the remaining time is allocated to "vocational projects." These projects are performed at home, consist of agricultural tasks for the boys and household projects for the girls, and are supervised by the teacher by means of weekly written reports which each student is required to submit.

Appellant's daughter, Sharon Garber, completed the eighth grade at Elreka Public School in Reno County in

May, 1964, being then fourteen years old. The following September, Sharon was enrolled in a high school correspondence school, the American School of Chicago. In the fall of 1965, although continuing her correspondence work, Sharon was not enrolled in any school, public or private. On October 5, 1965, appellant was served with notice of truancy and, on October 15, Sharon was enrolled in Harmony School at Yoder, Kansas. Thereafter, on October 18, 1965, an information was filed in the Reno County District Court charging that appellant had unlawfully and willfully failed to require his child "to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor. Contrary to Chapter 409 of the 1965 Session Laws of the State of Kansas."

A jury trial being expressly waived by appellant, the case was tried to the court on a stipulated set of facts and upon oral arguments. On January 10, 1966, appellant was adjudged guilty as charged, the court holding that appellant's religious beliefs were no defense to a violation of the Compulsory School Attendance Act and that that act did not infringe upon his freedom of religion. The court construed the act together with K.S.A. 72-1106, which provides the length of the school day for public schools, and held that attendance at Harmony School was not attendance at a parochial school "for such period as the public school of the district in which the child resides is in session."

A motion for new trial was, on January 24, 1966, overruled, and appeal to the Kansas Supreme Court followed.

The Supreme Court of Kansas, in an opinion filed November 5, 1966, affirmed the conviction, holding that the statute did not violate any of the appellant's constitutionally guaranteed religious freedoms.

ARGUMENT

I. The Kansas Compulsory School Attendance Law Does Not Violate the Free Exercise Clause of the First Amendment.

This case squarely presents a conflict of competing interests which has faced this Court before in other circumstances. In *Prince* v. *Massachusetts*, 321 U.S. 158, 64 Sup.Ct. 438, 88 L.Ed. 645 (1944), Mr. Justice Rutledge, speaking for the Court, described that conflict:

> "On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. . . . Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . . The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." 321 U.S. at 165.

In resolving that conflict, he notes that "the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on." Those guidelines leave little doubt as to the proper resolution of the present case.

In a democratic society, the strength and well-being of the nation, the continued existence of its government and way of life, and the development and progress of its people depend, to a peculiar degree, upon the enlightenment and education of its citizenry. It cannot be doubted that the state of Kansas, as a legitimate exercise of its

sovereign police power to provide for the health, safety, and welfare of its citizens, may provide for the education of its youth. *Interstate Consolidated Street Rwy. Co.* v. *Massachusetts*, 207 U.S. 79, 28 Sup.Ct. 26, 52 L.Ed. 111 (1907) (Holmes, J.); *Barbier* v. *Connolly*, 113 U.S. 27, 5 Sup.Ct. 357, 28 L.Ed. 923 (1884). The great majority of the states have provided for this important interest by enacting laws requiring children of the state to attend school.[1] Such laws have received the overwhelming approval of the state courts in the face of constitutional challenges based upon first amendment guarantees of religious freedom and upon the right of the parent to control the upbringing of his child. *Cude* v. *State*, 237 Ark. 927, 377 S.W.2d 816 (1964); *In re Shinn*, 195 Cal.App.2d 683, 16 Cal.Rptr. 165 (1961); *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), *app. dism'd*, 347 U.S. 972, 74 Sup.Ct. 785, 98 L.Ed. 1112 (1954); *Snyder* v. *Town of Newtown*, 147 Conn. 374, 161 A.2d 770 (1960), *app. dism'd*, 365 U.S. 299, 81 Sup.Ct. 692, 5 L.Ed.2d 688 (1961); *State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435 (1901); *Commonwealth* v. *Renfrew*, 322 Mass. 492, 126 N.E.2d 109 (1955); *Myerkorth* v. *State*, 173 Neb. 889, 115 N.W.2d 585 (1962), *app. dism'd*, 372 U.S. 705, 83 Sup.Ct. 1018, 10 L.Ed.2d 125 (1963); *State* v. *Hoyt*, 84 N.H. 38, 146 Atl. 170 (1929); *State* v. *Jackson*, 71 N.H. 552, 52 Atl. 1021 (1902); *Knox* v. *O'Brien*, 7 N.J.Super. 608, 72 A.2d 389 (1950); *Stephens* v. *Bongart*, 15 N.J.Misc. 8[illegible], 189 Atl. 131 (1937); *In re Currence*, 42 Misc.2d 418, 248 N.Y.S.2d 251 (1963); *Shapiro* v. *Dorin*, 199 Misc. 643, 99 N.Y.S.2d 830 (1950), *aff'd without opinion sub nom*; *People* v. *Donner*, 278 App.Div. 705, 103 N.Y.S.2d 757, *aff'd without opinion*, 302 N.Y. 857,

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1. In *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), the court remarked that, at the time of its opinion, only 11 of 48 states allowed home instruction, and that such instruction was specifically conditioned in all but 2 of those 11. 121 Cal.App.2d Supp. at 867, 263 P.2d at 688.

858, 100 N.E.2d 48, *app. dism'd*, 342 U.S. 884, 72 Sup.Ct. 178, 96 L.Ed. 663 (1951); *State* v. *Hershberger*, 103 Ohio App. 188, 144 N.E.2d 693 (1955); *Parr* v. *State*, 117 Ohio St. 23, 157 N.E. 555 (1927); *Commonwealth* v. *Smoker*, 177 Pa.Super. 435, 110 A.2d 740 (1955); *Commonwealth* v. *Beiler*, 168 Pa.Super. 462, 79 A.2d 134 (1951); *Commonwealth* v. *Bey*, 166 Pa.Super. 136, 70 A.2d 693 (1950); *State* v. *Williams*, 56 S.D. 370, 228 N.W. 470 (1929); *Dobins* v. *Commonwealth*, 198 Va. 697, 96 S.E.2d 154 (1957); *Rice* v. *Commonwealth*, 188 Va. 224, 49 S.E.2d 342, 3 A.L.R.2d 1392 (1948); *State ex rel. Shoreline School Dist.* v. *Superior Court*, 55 Wash.2d 177, 346 P.2d 999 (1959), *cert. den.*, 363 U.S. 814, 80 Sup.Ct. 1248, 4 L.Ed.2d 1154 (1960); *cf. Zorach* v. *Clauson*, 303 N.Y. 161, 100 N.E.2d 463 (1951), aff'd, 343 U.S. 306, 72 Sup.Ct. 679, 96 L.Ed. 954 (1952).[2]

This Court has recognized the power of states to require school attendance of all children residing in their confines, even in the face of claims that such a requirement violates the parent's religious scruples. In *Prince* v. *Massachusetts*, *supra*, the court remarked, "and neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.

2. *Commonwealth* v. *Beiler*, 168 Pa.Super. 462, 79 A.2d 134 (1951); *Wright* v. *State*, 21 Okla.Cr. 430, 209 Pac. 179 (1922); *People* v. *Levison*, 404 Ill. 574, 90 N.E.2d 213, 14 A.L.R.2d 1364 (1950); and *State* v. *Peterman*, 32 Ind.App. 665, 70 N.E. 550 (1904), are sometimes cited as holding to the contrary. However in the *Beiler* case, the applicable statute provided for "approved tutors," the Oklahoma statute involved in *Wright* made an exemption where "other means of education are provided," and the *Peterman* and *Levison* cases construed their statutes as allowing compliance by home instruction. The latter two cases are in a decided minority in their holdings that home instruction complies with the compulsory school attendance law, and none of the cases reach the question of the constitutionality of a statute which fails to provide an exemption in case of home instruction.

Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." 321 U.S. at 166. Appellant seeks to distinguish this case with the remark that "a state may well have a greater interest in keeping a nine year old off the city streets than in keeping a 15 year old from attending a parochial school which has less than the required number of classroom hours." Jurisdictional Statement, p. 16. The State of Kansas, however, is not prepared to say that the parent's denial to his child of the right to full self-realization, which is the triumph of our democracy and which is absolutely dependent upon adequate education, is any less serious than threats to the child's physical well-being. Its legislature has acted to prevent that as well as other abuses and this Court should uphold that salutary action.

Chief Justice Stone, in his dissenting opinion in *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 60 Sup.Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493 (1940), stated that, "The state concededly has power to require and control the education of its citizens. . . ." and that ". . . the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." 210 U.S. at 603, 604. When the Court subsequently reversed the *Gobitis* decision, in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 63 Sup.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674 (1943), it quoted approvingly from that passage in the Chief Justice's opinion. 319 U.S. at 631.

Even where the Court has set restrictions on the states' police powers with regard to education, it has carefully pointed out that the power to compel the education

of children was not being questioned. In *Pierce v. Society of Sisters*, 268 U.S. 410, 45 Sup.Ct. 571, 69 L.Ed. 1070 (1925), a case which held that the state could not restrict the parents' freedom of choice in selection of schools for their children by requiring that children attend only public schools, the Court expressly pointed out:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 U.S. at 534.

Similarly, where it was held that a prohibition against teaching any other than the English language until the pupil has passed the eighth grade is unconstitutional, the Court noted:

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 Sup.Ct. 625, 67 L.Ed. 1042 (1923).

In *Reynolds v. U. S.*, 98 U.S. 145, 25 L.Ed. 244 (1879), the respective spheres of freedom of religion and the law were delineated:

> "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices [which violate the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." 98 U.S. at 166-67.

Properly viewed, the question is one of parental control versus the state acting as parens patriae. Appellant's claim that his religious liberties are infringed in the instant restriction of his control of his daughter adds nothing to the merits of his case. *Prince* v. *Massachusetts, supra.* The family is not placed beyond regulation in the public interest by a claim of religious liberty. *Prince* v. *Massachusetts, supra; Reynolds* v. *U. S., supra; Davis* v. *Beason,* 133 U.S. 333, 33 L.Ed. 637, 10 Sup.Ct. 299 (1890). The authority of the parent must yield to the authority of the state acting to safeguard the welfare of its youth. *Jacobson* v. *Massachusetts,* 197 U.S. 11, 49 L.Ed. 643, 25 Sup.Ct. 358 (1905); *Prince* v. *Massachusetts, supra; cf. Meyer* v. *Nebraska, Pierce* v. *Society of Sisters, West Virginia State Bd. of Educ.* v. *Barnette,* all *supra.*

Kansas may, therefore, constitutionally require appellant to send his daughter to school until she reaches age 16.

The logical corollary of the power to compel school attendance is the power to establish minimum standards for all schools. Without this power, the state could not prevent sham compliance with its compulsory education act and the great ends for which that law was adopted would be subverted. If the state is to achieve its legitimate purpose of educating its citizenry it must be able to prescribe standards relating to curriculum, facilities, competence of instructors and similar subjects. There is no more important requirement than that relating to the time the school is to be in session. Appellant may not, by asserting that it is his religious conviction that his children should not attend formal school more than one morning per week, avoid compliance with the compulsory education law any more than he could by asserting it to be his belief that his children should not be educated at all.

II. The Kansas Compulsory Education Act Does Not Violate the Establishment of Religion Clause of the First Amendment.

Appellant urges that the statute here involved disallows the Amish parochial school, and that school being disfavored, all other parochial schools are preferred, violating the establishment of religion clause of the first amendment.

This argument must fail for the reason that Kansas has not disallowed Amish parochial schools. The statute, by its express terms, recognizes, as does the Kansas Court, 197 Kan. at 573, that parents have a right to educate their children elsewhere than in the public schools. It could not be contended otherwise. *Pierce* v. *Society of Sisters, supra.* All that is sought by the state is that the school established by the Amish comply with minimum state educational requirements concerning school hours. The right to educate their children without the public schools does not exempt the Amish from compliance with state requirements. *Zorach* v. *Clauson, supra; cf. Pierce* v. *Society of Sisters,* and *Meyer* v. *Nebraska, supra.*

It cannot successfully be contended that a statute which fails to provide for home study in lieu of school attendance and is repugnant to appellant's religion but is not offensive to most other faiths, prefers all other religions over that of appellant; or that such a statute is a law "respecting the establishment of religion". The bigamy laws offended only the Mormons and were nevertheless held valid. *Reynolds* v. *United States, supra*; *Davis* v. *Beason, supra.* The compulsory vaccination laws involved in *Jacobson* v. *Massachusetts, supra,* were repugnant to only a small minority of sects and were still upheld. The statute requiring school attendance six hours per day, five days

per week, is uniformly applied to all children in Kansas. Indeed, appellant's fears of establishment of religion might be justified if the statute were inapplicable to the Amish while applying to all other religions.

III. The Statute Does Not Offend Against the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

Since there is no preference of other parochial schools over that of the Amish, appellant's argument that such preference constitutes a denial of the equal protection of the laws and a deprivation of liberty without due process of law must also fail.

IV. The Clear and Present Danger Doctrine Is Not Applicable to This Case.

Appellant complains that the Kansas court failed to indicate what criterion it used in determining the constitutionality of the statute. He urges that the proper criterion is the clear and present danger test. A similar contention was made in *Prince* v. *Massachusetts*, *supra*, and evoked the following reply:

> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of matters of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection." 321 U.S. at 168.

The Kansas compulsory school attendance act is within that "broad range of selection."

WE THEREFORE RESPECTFULLY SUBMIT THAT APPELLANT PRESENTS NO SUBSTANTIAL QUESTION FOR THE DECISION OF THIS COURT, AND THAT THE APPEAL SHOULD BE DISMISSED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 393

LEROY GARBER,

Appellant,

—v.—

THE STATE OF KANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Argument

At pages 8 and 9 of Appellee's Motion to Dismiss, it is contended that this Court has never questioned the power of the state to compel the education of children. But Appellant does not question the existence of some quantum of such compulsory power. See Jurisdictional Statement, pp. 17-18. The question is rather the *extent* of such power: What are the constitutional limits?

This Court has indeed noted the due process questions raised by state educational requirements; see *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Bartels* v. *Iowa*, 262 U.S. 404 (1923); *Meyer* v. *Nebraska*, 262 U.S. 390

(1923). This Court's concern for the due process ramifications of school regulatory statutes is particularly apparent in *Farrington* v. *Tokushige*, 273 U.S. 284 (1927). In *Farrington* this Court affirmed the issuance of a temporary injunction forbidding Hawaiian territorial officials from enforcing a statute imposing certain regulations[1] on private schools.

This Court noted that the government has no right to give:

> "affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks." 273 U.S. at 298.[2]

The underlying issues in *Farrington* are similar to the questions raised by the present case. Thus, in *Farrington* this Court noted that the statute went beyond mere regulation, and that its enforcement would destroy the schools, which were subject to such regulation. *Ibid.* The present case likewise involves a statute (and its construction by the Supreme Court of Kansas), the effect of which may be to destroy the religion of appellant and all of his co-religionists in the State of Kansas. See Jurisdictional Statement, p. 11.

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[1] The statute limited pupils' attendance at foreign language schools to one hour per day; and required that such pupils also regularly attend public schools; that textbooks be approved by the territory; that a fee be paid of $1.00 per pupil; and that teachers obtain a permit and demonstrate a knowledge of American institutions and a command of the English language.

[2] There are definite due process limits on the extent to which a state can attempt to "standardize its children." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). "Compulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 604, 641 (1943).

The decision in *Farrington*, which appears to contradict a major premise of Appellee's Motion to Dismiss, gives further support to appellant's contention that this case presents substantial Federal constitutional questions.[1] Consideration and resolution of these questions merit plenary argument before the Court.

Respectfully submitted,

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September, 1967.

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[1] For a recent discussion of many of the problems in this case, see Note, "The Right Not to Be Modern Men: The Amish and Compulsory Education", 53 Va. L. Rev. 925 (1967).

[*] Appellant's attorneys gratefully acknowledge the research assistance of Mr. Neal Raines, third year student at Northwestern University School of Law.

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On Appeal from the Supreme Court of the State of Kansas

BRIEF AND APPENDIX, *AMICUS CURIAE*, IN SUPPORT OF JURISDICTION OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

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BRIEF, *AMICUS CURIAE*, IN SUPPORT OF JURISDICTION OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

This brief *amicus curiae* is submitted with the consent of counsel for both parties.

Interest of the *Amicus*

The National Committee for Amish Religious Freedom is an unincorporated association of the individuals listed in the appendix to this brief (*infra*, p. 15). They are united in a commitment to the principles of religious freedom and

share a deep concern that these principles be respected in their application to so unconventional a religious sect as the Amish. They deem it particularly appropriate to intervene because the doctrines of the Amish strongly discourage if indeed they do not forbid their own invocation of court action even in defense of the sect's religious freedom.

Scope of This Brief

The specific question presented in this appeal is whether a state can constitutionally punish a parent who for religious convictions does not require his 14-year-old daughter to attend a conventional public or parochial secondary school but instead provides for her continued education through a correspondence school and (simultaneously) an Amish home study program wherein the pupils are engaged together in educational activities under the direct supervision of a teacher only one morning each week.

This brief does not address itself to the merits of this question. In the event that the Court notes probable jurisdiction it is our intention again to seek leave to submit a brief *amicus curiae* in order to present our views on the merits. Here we address ourselves only to the question of jurisdiction and urge that the question presented is substantial, it is of national importance and it is one which only this Court can definitively resolve. Accordingly, we submit that probable jurisdiction should be noted.

ARGUMENT

1. The Issue of Pluralism

Initially we suggest that neither the substantiality of the question nor the national importance of its resolution is affected by the fact that the religious group involved is a small one. It is only where an assailed group is a small one that the issue of religious liberty is likely to come to the courts. The purpose of a Bill of Rights is to protect minorities; a major religious group does not usually need the First Amendment for its protection. The smaller the minority, the more likely it is to need judicial protection; the greater it is, the more likely it is to obtain the protection it needs through legislative exemption. It is the "discrete and insular" minority which has the right not only to invoke judicial protection but to demand a "more searching judicial inquiry" than when major groups are involved (cf. *United States* v. *Carolene Products*, 304 U. S. 144 footnote 4 [1938]).

Certainly the decisions of this Court give no indication of a reluctance to intervene where the affected religious group is small. The many Jehovah's Witnesses cases, upon which so much of today's law of religious liberty is based,[1] involved a small religious group. Sabbatarians protected in *Sherbert* v. *Verner*, 374 U. S. 398 (1963) are likewise comparatively few in number. It is unlikely that more than a handful of Americans share the religious convictions of the woman whose refusal to serve on a jury was vindicated in *In re Jenison*, 375 U. S. 14 (1963). The religious

1. See, Waite, THE DEBT OF CONSTITUTIONAL LAW TO JEHOVAH'S WITNESSES, 28 Minnesota Law Review 213 (1944).

convictions of the young men in the conscientious objector cases (*United States* v. *Seeger*, 380 U. S. 163 [1965]) were all individualistic.

For the same reason substantiality and importance are not lessened by the fact that the beliefs of the Amish are unconventional and their practices do not conform to generally accepted standards. The First Amendment ban on laws respecting an establishment of religion or prohibiting its free exercise manifested an intention to accord constitutional protection to the nonconforming and unconventional religions, those which are not part of the general establishment. Indeed, the philosophy underlying the First Amendment was that religious diversity was not something to be merely suffered but to be welcomed. "We wanted a land," in the words of Mr. Justice Douglas, "where our people can be exposed to all the diverse creeds and cultures of the world."[2] Uniformity of religious opinion, said Jefferson, was no more desirable than uniformity of face or stature.[3]

Religious pluralism insures domestic tranquillity. "In a free government," said the author of the First Amendment, "security for civil rights must be the same as that for religious rights; it consists in the one case in a multiplicity of interests and in the other in a multiplicity of sects."[4]

2. *Dennis* v. *United States*, 341 U. S. 494, 585 (1951) *dissent*.

3. In Notes on Virginia, Blau, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA, revised edition, p. 82.

4. Quoted in 1 Stokes, CHURCH AND STATE IN THE UNITED STATES, p. 348. Voltaire had written: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness." Quoted *ibid*.

There was a time, particularly after World War I when nationalism was at its height and uniformity, political, religious and cultural, was deemed a greatly desired end. It was the era that was committed to the melting-pot theory whereby persons of different nationalities and cultures were transformed into the "American type." It was in this period that Congress enacted an immigration law containing a national origins quota system whose purpose it was to exclude persons, from eastern and southern Europe, whose ethnic and cultural backgrounds were deemed too radically different from the Anglo-Saxon norm. This, too, was the period in which states enacted laws seeking to outlaw or make difficult the establishment of private schools or the teaching of foreign languages.

The decisions of this Court recognized then that insofar as American citizens were affected, cultural uniformity could not constitutionally be imposed coercively.[5] But

5. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1925); *Farrington* v. *Tokushige*, 273 U. S. 284 (1927). Cf. *Stainback* v. *Po*, 336 U. S. 368 (1949). In the *Pierce* case this Court found itself unimpressed by the following argument made by the attorney general of Oregon:

> "The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens. At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?"

even in the area of immigration, where the plenary powers of Congress are not subject to judicial scrutiny,[6] the recent elimination of the national origins quota system[7] testifies to radical change in national policy. We now recognize that unity and uniformity are not synonymous; that unity may lie in diversity; that we are a nation not only of people but of peoples; that American culture is a plurality of cultures.

The unconventionality and unorthodoxy of the Amish, therefore, not only do not negate the importance of the questions raised in this appeal, but on the contrary underline it. For implicit in this controversy is the extent to which the Constitution protects cultural pluralism. Economic, religious and other considerations make it impracticable for the Amish to establish a conventional parochial school system on the secondary school level leaving them with no alternative, should this Court refuse to accept jurisdiction, but to send their children into the public high schools as they now attend the public elementary schools. Appellant kept his daughter out of public high school because he felt that in the view of his church excessive contact with modern education would divert her from Amish religious and farm life (R. 12). It is quite possible that if all Amish children were compelled by law to attend public schools until the age of sixteen, on the threshold of both marital and college life, the result would be the assimilation of the Amish youth and the consequent disappearance of the Amish community and culture.[8]

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6. *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950).

7. Immigration Act of 1965.

8. The fear of assimilation was a major factor in the establishment of the Catholic parochial school system and remains today the most frequently asserted reason for the maintenance of the Jewish day school system.

We are aware, of course, that where the welfare of children is concerned this Court has followed a policy of allowing the legislative branch of government wide discretion even where First Amendment rights are asserted. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *People* v. *Donner*, 199 Misc. (N.Y.) 643, affirmed 278 App. Div. 705, affirmed 302 N.Y. 857, appeal dismissed, 342 U. S. 884 (1951). Nevertheless, the Court has not accepted the claim of child welfare as an insurmountable barrier to constitutional scrutiny of compulsory cultural unification. Child welfare considerations were asserted in the foreign language cases (*Meyer* v. *Nebraska, supra*; *Stainback* v. *Po, supra*) as they were in *Pierce* v. *Society of Sisters, supra*.[9]

It is not necessary at this point to suggest how these competing claims of cultural pluralism and child welfare should be judicially resolved. It is sufficient for the purposes of this brief to urge that this conflict of claims pre-

9. In the *Pierce* case the state attorney general argued before this Court:

> "The voters of Oregon who adopted this law had the right to act on the belief that the fact that the great increase in juvenile crime in the United States followed so closely after the great increase in the number of children in the United States who were not attending public schools, was more than a coincidence. The voters in Oregon might also have based their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissensions and consequent weakening of the community against foreign dangers. * * *"

sents a question of national importance which should be resolved and that definitive resolution can only come from this Court.

2. The Issue of Privacy

There is a second issue of importance implicit in this appeal, and that is the conflict between the claims of welfare and privacy. The Court recognized in *Prince* v. *Massachusetts, supra*, that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations which the state can neither supply nor hinder." The Court also recognized, of course, that "the family itself is not beyond regulation in the public interest" and that the rights of parenthood are not beyond limitation.

It is hardly disputable that standards of public interest and public welfare have been advancing and continue to advance. We are living in what is in good part a welfare state. Compulsory school attendance originally envisioned only sufficient schooling to master the basic elements of education necessary to prepare children to be able later to earn a livelihood. Later it was extended to encompass a full elementary school career and today reaches completion of secondary school or attainment of the age of sixteen. It is by no means impossible that within the next decade or two it may extend through college or attainment of the age of twenty-one.

This Court has understandably manifested in recent years a great reluctance to interfere with legislative discre-

tion in the arena of social welfare. Yet such discretion may not be constitutionally unlimited, at least where it collides with familial privacy. See *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). The Court is not here faced with a case where parental sovereignty directly and immediately threatens the health, security or welfare of a child as where the parents allow it to engage in adult labor or deprive it of needed medical attention (*Prince* v. *Massachusetts, supra; People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, certiorari denied 344 U. S. 824 [1952]). There is nothing in the record to support an inference that Amish children are less happy or secure than those raised in conventional religions. We do not therefore have here a case where the circumstances clearly call for state intrusion into the privacy of the family as the only means of preventing grave injury to children.

The right of privacy, the right to be left alone, is precious in a democratic society. The Constitution protects freedom of association (*National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449 [1958]); can it be said that it does not protect equally the right of non-association? The effect of the statute as applied in this case is to compel Amish children to associate with non-Amish during their school years up to the age of sixteen. The rationale of *Pierce* v. *Society of Sisters, supra*, is that such compulsory association is constitutionally impermissible. If the State of Kansas may compel Amish of the ages of fourteen and fifteen to associate with other children within the four walls of a school building six hours a day and five days a week, why may the State of Oregon not compel Catholic children to associate with non-Cath-

olics within the four walls of a public school building during the same period of time?

In the Amish community the family is a closely knit, cohesive unit. It impinges upon the rights of no other individual or group. It asks only to be let alone. No doubt many Americans consider it an anachronistic vestige of primitive simple society. Yet, can it be summarily held that its right to be left alone is entitled to no constitutional protection? Can it be summarily held that the power of the welfare state to intrude upon the privacy of the family is subject to no constitutional limitation? Whatever may be the ultimate resolution of the issue, we submit that it should not be disposed of summarily and that accordingly probable jurisdiction should be noted.

3. The Issue of Freedom

The most obvious issue raised in this appeal is of course that of the limits of religious freedom. "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare," the Kansas Supreme Court said in its opinion, "has never been condoned in the name of religious freedom" (Jurisdictional Statement, p. 31). Although the court did not cite *Minersville School District* v. *Gobitis* (310 U. S. 486 [1940]), it echoed that decision wherein Mr. Justice Frankfurter said (at 594-595):

> * * * The religious liberty which the Constitution protects has never excluded legislation of a general scope not directed against doctrinal loyalties of particular sects. * * * Conscientious scruples have not, in the course of the long struggle for religious toleration,

> relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities * * *

Yet, if these are the limits of constitutionally protected religious liberty there would be no need for the free exercise clause. Restrictions upon the expression of religious beliefs would be forbidden by the freedom of speech guaranty. *Schneider* v. *Irvington*, 308 U. S. 147 (1939). A law aimed at the restriction of religious conduct generally would be forbidden by the mandate of neutrality toward religion in the establishment clause (*Everson* v. *Board of Education*, 330 U. S. 1 [1947]) and one directed against a particular sect would violate both that clause and the equal protection guaranty. *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953).[10]

It may well be the unique function of the free exercise clause to protect those whose particular religious beliefs forbid compliance with the demands of a general, secular law not deemed objectionable by adherents of the conventional faiths. Decisions which have rejected claims of unconstitutional infringement upon the free exercise of religion are justifiable not on the ground that the First Amendment may never require exemptions from general non-discriminatory welfare laws, but because of a para-

10. While the equal protection clause is not expressly applicable to the Federal government, this Court has consistently stricken down Federal action which if it had been that of the states would have violated the equal protection clause. See *Hurd* v. *Hodge*, 334 U. S. 24 (1948). *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Schneider* v. *Rusk*, 377 U. S. 163 (1964).

mount, overriding societal need, such as preservation of the monogomous family society (*Reynolds* v. *United States*, 98 U. S. 145 [1878]) or national defense (*Hamilton* v. *Regents of California*, 293 U. S. 245 [1934]).

When this Court held that a state could constitutionally forbid Sabbatarians from engaging in secular business on Sundays it did not do so on the ground that religious exemptions from welfare laws may never be required by the First Amendment but that they are not required where the burden on religious observance is indirect and the State cannot accomplish its welfare purpose except by imposing the burden. *Braunfeld* v. *Brown*, 366 U. S. 599 (1961). In the present case the burden is direct (as it would have been in *Braunfeld* if the State law compelled affirmative conduct on Saturday rather than merely forbade secular conduct on Sunday) and it can hardly be adjudicated summarily that Kansas cannot accomplish its welfare purpose except by requiring Amish children to remain within the four walls of a school six hours a day and five days a week until they attain the age of sixteen.

In any event, it is not correct to say that "failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom." The South Carolina unemployment compensation law and the Minnesota jury service law certainly imposed "reasonable requirements in the exercise of the police power for the general welfare", and in both instances this Court has condoned noncompliance for reasons of conscience. *Sherbert* v. *Verner*, *supra*; *In re Jenison*, *supra*.

It is clear, we submit, that the religious freedom question raised in this appeal is substantial, no less substantial than those raised in *Sherbert* and *Jenison*. We submit, too, that it is an important question affecting as it does the religious conscience and perhaps survival of what the trial court found to be "a quiet, pious, law-abiding and industrious people whose vitalizing contributions to the development of the agricultural resources of the communities in which they live are substantial" (Jurisdictional Statement, p. 45). The question, we suggest, is too substantial and too important to be disposed of summarily.

Conclusion

For the foregoing reasons probable jurisdiction should be noted in this case.

Respectfully submitted,

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September, 1967

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